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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MARTINEZ,

Defendant and Appellant.

B203813

(Los Angeles County  
Super. Ct. No. NA045466)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed with directions.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

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Jose Martinez was convicted by jury of 35 felonies arising from an armed robbery that he and an accomplice committed at a Torrance restaurant in 2000. There were 13 victims of the crimes, and defendant was convicted of 13 counts of robbery or attempted robbery, 13 counts of assault with a semiautomatic firearm, and 9 counts of false imprisonment. (None of the victims was injured.) The jury further found that defendant personally used a firearm in the commission of the offenses. In a separate proceeding, the trial court found that defendant had suffered a prior felony conviction within the meaning of Penal Code sections 667.5, subdivision (a)(1), and 1170.12 (the “Three Strikes” law).

Defendant appealed, contending that his confrontation rights were prejudicially violated, nine of the assault convictions were not supported by substantial evidence, and various sentencing errors occurred. We rejected defendant’s contention regarding confrontation rights but reversed nine of his assault convictions and remanded the matter for resentencing. (*People v. Martinez* (June 27, 2005, B168424) [nonpub. opn.] (*Martinez I*)).

Defendant now appeals from the resentencing, contending that the trial court erred by failing to hold a new sentencing hearing, failing to provide for allocution, and failing to grant custody credits. He further argues that trial counsel rendered ineffective assistance by failing to request a new sentencing hearing and failing to argue for concurrent sentences. We again remand for resentencing.

### **BACKGROUND**

Defendant was originally sentenced in June 2003. One of the assault convictions (count 7) was selected as the principal offense, on which the upper term of nine years was imposed on the basis that the crime involved the threat of great bodily harm. The sentence was doubled to 18 years under the Three Strikes law and a 10-year enhancement for firearm use was also imposed, for a total sentence on count 7 of 28 years. Defendant was further sentenced to consecutive terms of four years on each of the remaining 12 counts of assault, enhanced by one year four months as to each count, for a total of 64 years. A five-year enhancement was also imposed for defendant’s prior conviction, for a

grand total of 97 years in state prison. (Concurrent sentences were imposed on defendant's remaining convictions.)

In his original appeal, defendant argued that evidence of the manner in which firearms were used during the robbery did not support the assault convictions as to nine of the 13 victims. We agreed and reversed the nine convictions, leaving unaffected defendant's convictions of assault in counts 7, 12, 27, and 38. (*Martinez I, supra*, B168424 at pp. 7–8.)

Defendant also argued in his original appeal that imposition of the upper term based on an aggravating factor not found by the jury violated his constitutional rights under the then-recently decided case of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] and that error occurred under Penal Code section 654. We concluded: “Because nine of the assault counts are being reversed for insufficient evidence, the sentence that had been imposed by the trial court cannot stand. Accordingly, the matter must be remanded for resentencing, at which time defendant can raise additional arguments with respect to the appropriate term to be imposed. We further note defendant contends and the Attorney General agrees that defendant entertained a single objective and intent with respect to each victim. Consequently, Penal Code section 654 requires that a second (or, if applicable, third) sentence based on conduct with respect to each victim be stayed rather than imposed concurrently.” (*Martinez I, supra*, B168424 at p. 8.)

In October 2007, defendant appeared for resentencing before the same trial judge who had originally presided and was represented by the same trial attorney. At the beginning of the hearing, the court stated that conduct credits did not need to be recalculated. Both counsel concurred, and the court commented: “We’re just bringing [defendant] out and sending him back. I don’t think we need to redo credits.”

The court next asked, “Does either side want to be heard?” Counsel responded in the negative. Thereafter, the court dismissed the counts that had been reversed and stated: “I’m simply going to resentence [defendant] on the balance of the [assault] charges and I think actually that those counts, the sentences can remain the same.” The

court again sentenced defendant to the upper term of nine years on count 7, again doubling the term under the Three Strikes law to 18 years and adding a 10-year enhancement for firearm use, for a total of 28 years. The court again imposed consecutive terms of four years with one year four month enhancements on the remaining three assault counts (totaling 16 years) and a five-year enhancement was again imposed for defendant's prior conviction, for a grand total of 49 years in state prison. Sentence on all of the remaining counts was stayed under Penal Code section 654.

### **DISCUSSION**

The Attorney General aptly agrees with defendant that the trial court erred in failing to recalculate defendant's custody credits, as required under *People v. Buckhalter* (2001) 26 Cal.4th 20, 22–23. Accordingly, contends the Attorney General, “the cause must be remanded for the trial court to award appellant credit for the actual time he served from the date of his original sentencing to the date of his resentencing following remand.”

Two additional sentencing errors also exist. Although the oral pronouncement of sentence and the minute order of the sentencing hearing indicate that consecutive sentences were imposed on counts 12, 27, and 38,<sup>1</sup> the abstract of judgment erroneously reflects that the consecutive sentences were imposed on counts 12, 18, and 27.<sup>2</sup> And although there is no practical difference to defendant between a sentence imposed concurrently and a sentence stayed under Penal Code section 654, the trial court had no basis for staying all of the sentences on which prison time was not being imposed. The victims of the nine dismissed assault counts were also victims of one or more counts of robbery, attempted robbery, and false imprisonment. Thus, rather than the trial court's

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<sup>1</sup> Counts 12, 27, and 38, along with count 7, are the assault counts that were affirmed in *Martinez I*.

<sup>2</sup> Count 18 was one of the counts reversed in *Martinez I*, which the trial court dismissed on resentencing.

wholesale utilization of Penal Code section 654, the proper procedure would have been to impose a concurrent sentence on one count as to each of these nine victims.

Defendant further argues that it appears from the brevity of the proceedings on remand that the court and counsel failed to realize defendant was entitled to a full resentencing hearing, at which he could present for consideration any pertinent circumstances that had arisen in the four years since he had been in prison. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460.) Defendant further notes that given the spatial and temporal proximity of the crimes involved, the court had discretion to refrain from imposing any consecutive sentences. (See *People v. Deloza* (1998) 18 Cal.4th 585, 595.)

On this record, which does not reveal when trial counsel was reappointed to represent defendant or why counsel elected to forgo any argument on resentencing, we are not in a position to assess whether a valid argument existed in mitigation of sentence but was not made. Nevertheless, given the need for remand, such considerations may be taken up at the resentencing hearing.

#### **DISPOSITION**

The judgment is affirmed, and the matter is remanded for resentencing.

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MALLANO, P. J.

We concur:

ROTHSCHILD, J.

BAUER, J.\*

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\* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.